IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD J. CLARSON as ADMINISTRATOR of LOCAL No. 731, I. B. of T., EXCAVATORS AND PAVERS PENSION TRUST FUND,	)	
and	)	
LOCAL No. 731, I. B. of T., EXCAVATORS AND PAVERS PENSION TRUST FUND,	)	**Case No.: 17-cv-2543**
Plaintiffs,	)	
v.	)	
FASO EXCAVATING CO., CHICAGO TITLE LAND TRUST COMPANY TRUST NUMBER 1716, and any other trade or business under common control with FASO EXCAVATING CO.,	)	
Defendants.	)	

COMPLAINT

Plaintiffs, Richard J. Clarson ("Clarson") as Administrator of the Local No. 731, I. B. of T., Excavators and Pavers Pension Trust Fund and the Local No. 731, I. B. of T., Excavators and Pavers Pension Trust ("Fund") bring this complaint against Defendants Faso Excavating Co. ("Faso" or "Company"), Chicago Title Land Trust Company Trust Number 1716, and any other trade or business under common control with Faso and allege as follows:

JURISDICTION AND VENUE

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001-1461, to collect withdrawal liability, interest, and penalties and, as such, this

Court has jurisdiction over this action under Sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f), and 1451(c).

2. Venue lies in this court under Sections 502(e)(2) and 4301(d) of ERISA, 29 U.S.C. §§ 1132(e)(2) and 1451(d), as the Fund is administered by its Trustees at its principal place of business at 1000 Burr Ridge Parkway, Burr Ridge, Illinois, 60527.

PARTIES

3. Plaintiff Clarson is the Administrator and a fiduciary of the Fund, a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301(a)(3).

4. Pursuant to Sections 502(a)(3) and 4301(a)(1) of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), as a fiduciary, Clarson is authorized to bring this action on behalf of the Fund, its participants, and its beneficiaries for the purpose of collecting withdrawal liability.

5. Defendant Faso is an Illinois corporation. On information and belief, its principal place of business is located in the State of Illinois in this district.

6. Defendant Chicago Title Land Trust Company Trust Number 1716 ("Trust") is a trust created in Illinois under a trust agreement dated January 14, 1981. The Chicago Heights National Bank, a bank located in Illinois, initially acted as the Trustee of the Trust. Bank Calumet, N.A., also an Illinois bank, became the successor Trustee. The current Trustee is Chicago Title Land Trust Company, an Illinois land trust company.

FACTS

7. As of December 31, 2013, John Faso and Joseph A. Faso each held a 50% beneficial interest in the Trust.

8. As of December 31, 2013, John Faso and Joseph A. Faso each owned 50% of Faso.

9. Faso operated out of property located at 137 East 17th Street in Chicago Heights, Illinois (the "Chicago Heights Property").

10. From at least November 2, 1992 through the date that this Complaint is filed, the Trust owned the Chicago Heights Property.

11. Faso has been an employer engaged in an industry affecting commerce and has been subject to successive collective bargaining agreements with the Excavating, Grading, Asphalt, Private Scavengers, Automobile Salesroom Garage Attendants and Linen and Laundry Drivers Local Union No. 731, I. B. of T., under which Faso has been required to make contributions to the Fund for each hour worked by its employees performing certain types of work described in the agreement.

12. For each of the Fund's plan years ending on December 31 of 2011, 2012, and 2013, the hours for which Faso contributed to the Fund decreased by more than 70% compared to the average annual hours for which Faso contributed to the Fund in 2006 and 2007, which are the two years from 2006 through 2010 during which the Company contributed for the most hours.

13. In November of 2016, the Fund's actuaries determined that, due to this decrease in contributions, effective December 31, 2013, Faso incurred a partial withdrawal under Section 4205 of ERISA, 29 U.S.C. § 1385.

14. The Fund's actuaries determined that, under Section 4201(b) of ERISA, 29 U.S.C. § 1381(b), Faso owes $243,289 in withdrawal liability due to its partial withdrawal from the Fund in 2013.

15. Through its attorneys, the Fund sent Faso a letter dated November 8, 2016 ("Notice and Demand") that notified the Company of its withdrawal liability. A copy of that letter is attached hereto as Exhibit A.

16. The Notice and Demand provided that the amount of withdrawal liability incurred by Faso was $243,289, and that it could discharge its liability through 12 quarterly installments in the amount of $21,567 and a final installment of $2,635. Ex. A.

17. The Notice and Demand also explained Faso's right to request review of the Fund's withdrawal liability determination within 90 days of receipt of the Notice and Demand and stated that Faso would be in default if it failed to remit payment to the Fund. Ex. A.

18. The Fund sent the Notice and Demand to Faso via United Parcel Service overnight delivery and United States Postal Service certified mail.

19. Faso received the Notice and Demand via UPS on November 9, 2016, confirmed by UPS Tracking Number 1ZF354E82491089186.

20. Faso received the Notice and Demand via certified mail on November 10, 2016 confirmed by signed certified mail card.

21. Faso, through its counsel, requested review of the Fund's withdrawal liability determination by letter dated December 16, 2016. The letter stated that Faso was in the process of liquidating "what little assets it owns."

22. By letter dated December 23, 2016 ("Acceleration Letter"), the Fund notified Faso that, based on the Company's statement that it had little assets and was liquidating those assets, the Fund determined that Faso was insolvent, intended to conduct a bulk sale of its remaining assets, and had failed to maintain a reasonable ratio of current assets in comparison to current liabilities. Ex. B. The Acceleration Letter further stated that, based on these

circumstances, Faso was in default and that its withdrawal liability would be accelerated pursuant to the Fund's withdrawal liability procedures and ERISA Section 4219(c)(5)(B). *Id*.

23. The Acceleration Letter indicated that, due to the acceleration, Faso's full $243,289 withdrawal liability was due by January 6, 2017. Ex. B.

24. Faso did not remit the $243,289 withdrawal liability payment by January 6, 2017 and has not remitted any withdrawal liability payments to the Fund as of the date this Complaint is filed.

COUNT I
LIABILITY FOR COMPLETE WITHDRAWAL UNDER ERISA § 4201
FASO EXCAVATING CO.

25. Plaintiff incorporates by reference paragraphs 1 through 24 of this Complaint, as through fully set forth herein, as paragraph 25 of this Count I.

26. On December 31, 2013, Faso effected a "partial withdrawal" from the Plan, as defined in Section 4201(b) of ERISA, 29 U.S.C. § 1381(b).

27. Due to this partial withdrawal, Faso incurred $243,289 in withdrawal liability to the Fund, as determined under section 4201(b) of ERISA, 29 U.S.C. § 1381(b).

28. The Notice and Demand provided Faso with the notice of withdrawal liability required by Sections 4202(2) and 4219(b) of ERISA, 29 U.S.C. §§ 1382(2) and 1399(b).

29. Section 4219(c)(5)(B) of ERISA, 29 U.S.C. § 1399(c)(5)(B), provides that a default occurs when "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability."

30. The Trustees have adopted rules defining events which indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability. *See* Ex. B, Acceleration Letter at Supplement A, Section XV(I)(2). Those events include: "the Employer's

insolvency," "an intended bulk sale by the Employer," and the "failure of the Employer to maintain a reasonable ratio of current assets in comparison to current liabilities." *Id.*

31. Based Faso's statement that it was in the process of liquidating "what little assets it owns," the Trustees concluded that the events in the preceding paragraph had occurred.

32. Faso did not make a withdrawal liability payment to the Fund by January 6, 2017 and Faso is now in default within the meaning of ERISA section 4219(c)(5), 29 U.S.C. § 1399(c)(5).

33. Pursuant to Section 4219(c)(5) of ERISA, 29 U.S.C. § 1399(c)(5), the Fund is entitled to immediate payment of the entire amount of Faso's outstanding withdrawal liability, plus accrued interest on that amount accruing from the date of the missed payment.

34. Pursuant to the Fund's procedures pertaining to withdrawal liability and Sections 502(g)(2) and 4301(b) of ERISA, the Fund is also entitled to payment of liquidated damages in an amount equal to the interest or 20% of the withdrawal liability, whichever is greater, and all attorneys' fees and costs that the Fund has incurred related to this matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

a. That, pursuant to Sections 502(g)(2) and 4301(b) of ERISA, 29 U.S.C. §§ 1132(g)(2) and 1451(b), judgment be entered in its favor and against Faso Excavating Co. for: $243,289 in withdrawal liability; pre-judgment interest on the entire amount of withdrawal liability assessment beginning on the date of default, computed and charged at an interest rate equal to the P.B.G.C. rate reported by the Board of Governors of the Federal Reserve System as set forth in Statistical Release H.15; an amount equal to the greater of the interest on the unpaid withdrawal liability or liquidated damages equal to 20% of the unpaid withdrawal liability; and attorneys' fees and costs incurred by the Fund with respect to this matter;

b. All such other legal and equitable relief as the Court deems just and proper.

COUNT II: CONTROL GROUP LIABILITY
FOR COMPLETE WITHDRAWAL UNDER ERISA § 4201
CHICAGO TITLE LAND TRUST COMPANY TRUST NUMBER 1716
AND ANY OTHER TRADE OR BUSINESS UNDER
COMMON CONTROL WITH FASO EXCAVATING CO.

35. Plaintiff incorporates by reference paragraphs 1 through 34 of this Complaint, as though fully set forth herein, as Paragraph 35 of this Count II.

36. Under Section 4001(b)(1) of ERISA, 29 U.S.C. Section 1301(b)(1), and the regulations promulgated thereunder, all trades or businesses (whether or not incorporated) under common control are treated as a single employer for the purpose of the assessment and collection of withdrawal liability.

37. The Seventh Circuit has established a categorical rule that leasing property to a withdrawing employer or allowing the employer to use the property rent-free constitutes a trade or business. *Messina Prods.*, 706 F.3d at 882-83.

38. The Trust, as the owner of the Chicago Heights Property, either leased the Chicago Heights Property to Faso, the withdrawing employer, or allowed Faso to use the Chicago Heights Property without paying rent. Accordingly, the Trust is a trade or business.

39. Under 26 U.S.C. § 1563 and the regulations promulgated thereunder, organizations are treated as being under common control when the same individuals have 80% or more of the control of the organizations.

40. Because John Faso and Joseph A. Faso each held a 50% beneficial interest in the Trust and each owned 50% of Faso as of December 31, 2013, those entities were under common control as of the date of partial withdrawal.

41. When Faso withdrew from the Fund, Faso, the Trust, and any other trades or businesses that were under common control with Faso as of the date of the withdrawal (“Control

Group") incurred withdrawal liability to the Fund in the amount of $243,289, as determined under Section 4201(b) of ERISA.

42. Since notice to one member of a control group constitutes notice to all members of the control group, the Notice and Demand provided the Control Group with the notice required by Sections 4202(2) and 4219 of ERISA, 29 U.S.C. §§ 1382(2) and 1399.

43. Due to Faso's insolvency, intended bulk sale, and failure to maintain a reasonable ratio of assets to liability, the Control Group is in default within the meaning of Section 4219(c)(5)(B) of ERISA, 29 U.S.C. § 1399(c)(5)(B) and the Fund's withdrawal liability rules.

44. Pursuant to Section 4219(c)(5) of ERISA, 29 U.S.C. § 1399(c)(5), the Fund is entitled to immediate payment of the entire amount of the Faso's outstanding withdrawal liability, jointly and severally, from each member of the Control Group, plus accrued interest on that amount accruing from the date of the first missed payment, liquidated damages, and attorneys' fees and costs incurred by the Fund.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

c. That, pursuant to Sections 502(g)(2) and 4301(b) of ERISA, 29 U.S.C. §§ 1132(g)(2) and 1451(b), judgment be entered in its favor and against all trades or businesses under common control with against Faso Excavating Co., Chicago Title Land Trust Company Trust Number 1716, and any other trade or business under common control with Faso Excavating Co., jointly and severally, for: $243,289 in withdrawal liability; pre-judgment interest on the entire amount of withdrawal liability assessment beginning on the date of default, computed and charged at an interest rate equal to the P.B.G.C. rate reported by the Board of Governors of the Federal Reserve System as set forth in Statistical Release H.15; an amount equal to the greater of the interest on the unpaid withdrawal liability or liquidated damages equal to 20% of the unpaid withdrawal liability; and attorneys' fees and costs incurred by the Fund with respect to this matter;

d. All such other legal and equitable relief as the Court deems just and proper.

Respectfully submitted,

/s/ Jeremy M. Barr
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